Supreme Court, U.S.
FILED
JAN 23 2003
CLERK

No. 02-281

In the Supreme Court of the United States

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY, PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY, DAN LUCAS, INDIVIDUALLY AND AS SHERIFF, PETITIONERS

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

BARBARA MCDOWELL
Assistant to the Solicitor General

ELIZABETH ANN PETERSON
R. JUSTIN SMITH
ETHAN G. SHENKMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an Indian Tribe and a corporation established by the Tribe to operate Class III gaming pursuant to a tribal-state compact under the Indian Gaming Regulatory Act are "person[s]" entitled to sue under 42 U.S.C. 1983.

2. Whether state law-enforcement officers had the authority to seize records of the tribal corporation pursuant to a warrant issued by a state court in connection with an investigation of alleged state-law welfare fraud offenses committed by employees of the corporation.

3. Whether, if respondents may sue under 42 U.S.C. 1983, the state law-enforcement officers who executed the search warrant are entitled to qualified immunity.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
I. The Tribe, as a sovereign, and the corporation, as an arm of that sovereign, are not "persons" who may sue and be sued under 42 U.S.C. 1983	6
A. A Tribe, like a State, is not a "person" within the contemplation of Section 1983	7
B. A tribal casino corporation, as an arm of the Tribe, is likewise not a "person" under Section 1983	11
II. State officers may arrest individuals or search for and seize private property on tribal lands pursuant to a state court warrant, but may not seize property of the Tribe itself or of the Tribe's instrumentalities	14
A. Although Tribes retain inherent sovereignty, States have authority within Indian country to investigate crimes that are within their prosecutorial jurisdiction	15
B. State law-enforcement officers, when investigating and prosecuting crimes within their jurisdiction, generally may enter a reservation to execute state process, but may not do so against the Tribe itself	18
III. Even if respondents had a right of action under 42 U.S.C. 1983, the individual petitioners would be entitled to qualified immunity	28
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982) 11
American Vantage Cos. v. *Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002) 11
Anderson v. *Creighton*, 483 U.S. 635 (1987) 28
Boron Oil Co. v. *Downies*, 873 F.2d 67 (4th Cir. 1989) ... 24
Breard v. *Greene*, 523 U.S. 371 (1998) 7, 8
Brown v. *Gardner*, 513 U.S. 115 (1994) 8
Bryan v. *Itasca County*, 426 U.S. 373 (1976) 17, 22
C & L Enters. v. *Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 20
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 17
Cherokee Nation v. *Georgia*, 30 U.S. (15 Pet.) 17 (1831) 15
College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 12
District of Columbia v. *Carter*, 409 U.S. 418 (1973) 10
Duro v. *Reina*, 495 U.S. 676 (1990) 16
Edelman v. *Jordan*, 415 U.S. 651 (1974) 11
Edwards v. *United States Dep't of Justice*, 43 F.3d 312 (7th Cir. 1994) 24
Elk v. *Wilkins*, 112 U.S. 94 (1884) 9-10
Elko County Grand Jury, In re, 109 F.3d 554 (9th Cir. 1997) 24
Fort Leavenworth R.R. v. *Lowe*, 114 U.S. 525 (1885) 21, 23
Gavle v. *Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), cert. denied, 524 U.S. 911 (1998) 12
Hanlon v. *Berger*, 526 U.S. 808 (1999) 30
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 28
Illinois v. *City of Chicago*, 137 F.3d 474 (7th Cir. 1998) 11

Cases—Continued: Page

Kansas Indians, The, 72 U.S. (5 Wall.) 737 (1866) 8
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 20
Lineen v. *Gila River Indian Cmty.*, 276 F.3d 489 (9th Cir. 2002) 20
Lugar v. *Edmondson Oil Co.*, 457 U.S. 922 (1982) 10
Lynch v. *Household Fin. Corp.*, 405 U.S. 538 (1972) 10
Maine v. *Thiboutot*, 448 U.S. 1 (1980) 10
Maryland Cas. Co. v. *Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1961) 20
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 20
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) 20
Minnesota v. *United States*, 305 U.S. 382 (1939) 22
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 15
Monell v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) 8
Montana v. *Blackfeet Tribe*, 471 U.S. 759 (1985) 20
Montana v. *United States*, 450 U.S. 544 (1981) 25
Moor v. *County of Alameda*, 441 U.S. 693 (1973) 11
National Farmers Union Ins. Cos. v. *Crow Tribe*, 471 U.S. 845 (1985) 1, 15
Native Vill. of Venetie IRA Council v. *Alaska*, 155 F.3d 1150 (9th Cir. 1998) 11
Nevada v. *Hicks*, 533 U.S. 353 (2001) 15, 16, 17, 19, 20, 21, 23, 25
New York v. *P.J. Video, Inc.*, 475 U.S. 868 (1986) .....
Ngiraingas v. *Sanchez*, 495 U.S. 182 (1990) 7
Ohio River Contract Co. v. *Gordon*, 244 U.S. 68 (1916) 21
Oklahoma Tax Comm'n v. *Chicksaw Nation*, 515 U.S. 450 (1995) 26
Oklahoma Tax Comm'n v. *Citizens Band of Potawatomi Indian*, 498 U.S. 505 (1991) 12

Cases—Continued: Page

Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 26
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 (1974) 15
Pennsylvania v. *Porter*, 659 F.2d 306 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982) 11
Puyallup Tribe v. *Department of Game*, 391 U.S. 392 (1968) 17-18
Puyallup Tribe, Inc. v. *Department of Game*, 433 U.S. 165 (1977) 20
Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425 (1997) 11
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 20
Saucier v. *Katz*, 533 U.S. 194 (2001) 28
Shakopee Mdewakanton Sioux Cmty. v. *City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 11
Siren, The, 74 U.S. (7 Wall.) 152 (1868) 22
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 28
Sycuan Band of Mission Indians v. *Roache*, 788 F. Supp. 1498 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994) 29
Texas v. *New Mexico*, 462 U.S. 554 (1983) 26-27
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g*, 476 U.S. 877 (1986) 17, 20
Trudgeon v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65 (Ct. App. 1999) 12
United States v. *Antelope*, 430 U.S. 641 (1977) 17
United States v. *Baker*, 894 F.2d 1144 (10th Cir. 1990) 29
United States v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993) 4, 21, 29
United States v. *Kagama*, 118 U.S. 375 (1886) 19, 20
United States v. *McBratney*, 104 U.S. 621 (1881) 16
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 28

Cases—Continued: Page

United States v. *Wheeler*, 435 U.S. 313 (1978) 15, 16
United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 (1951) 24
Utah & Northern Ry. v. *Fisher*, 116 U.S. 28 (1885) 19
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 7, 8
Weeks Constr., Inc. v. *Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986) 14
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 5, 7, 10, 11
Williams v. *Lee*, 358 U.S. 217 (1959) 3
Wilson v. *Layne*, 526 U.S. 603 (1999) 28, 30
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 8

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 8
Art. VI 8
Cl. 2 (Supremacy Clause) 21
Amend. IV 3, 4, 28, 29
Amend. XIV 3, 9, 10
Due Process Clause 29
Act of June 2, 1924, ch. 233, 43 Stat. 253 10
Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 ..... 16, 17, 22, 24
Civil Rights Act of 1871, ch. 22, 17 Stat. 13 10
Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* 2
18 U.S.C. 1166(d) 17
25 U.S.C. 2706(b)(4) 27
25 U.S.C. 2710(b)(2)(A) 12, 13
25 U.S.C. 2710(b)(2)(B) 13
25 U.S.C. 2710(b)(4) 12
25 U.S.C. 2710(d) 11
25 U.S.C. 2710(d)(1)(A)-(D) 17
25 U.S.C. 2710(d)(3) 17

Statutes and regulations—Continued:	Page
25 U.S.C. 2713	27
25 U.S.C. 2715(a)	27
25 U.S.C. 2716(b)	27
Indian Major Crimes Act, 18 U.S.C. 1153	16
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*)	13
§ 16, 25 U.S.C. 476	13-14
§ 17, 25 U.S.C. 477	14
Social Security Act, 42 U.S.C. 201 *et seq.*:	
Tit. IV-A, 42 U.S.C. 601 *et seq.*	18
42 U.S.C. 602(a)(6)	18
42 U.S.C. 609(a)(1)	18
42 U.S.C. 609(a)(4)	18
Tit. XI-A, 42 U.S.C. 1301 *et seq.*:	
42 U.S.C. 1320b-7	18
Rev. Stat. § 1979 (1874)	10
18 U.S.C. 1152	16
18 U.S.C. 1154 *et seq.*	17
18 U.S.C. 1162(a)	16
18 U.S.C. 1163	17
18 U.S.C. 1166(d)	17
25 U.S.C. 479a note	25
25 U.S.C. 1301(1)	25
25 U.S.C. 1302(7)	16
25 U.S.C. 3601	25
25 U.S.C. 4101(7)	25
28 U.S.C. 1331	14
28 U.S.C. 1360	17
42 U.S.C. 1983	*passim*
25 C.F.R.:	
Sections 571.5-571.7	27
Sections 571.8-571.10	27
28 C.F.R. 59.1(b)	24
45 C.F.R.:	
Section 205.50(a)(2)(ii)	27
Section 286.75(f)	18

Miscellaneous:	Page
Black's Law Dictionary (5th ed. 1979)	20
Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (2000)	25
67 Fed. Reg. 46,328 (2002)	2
65 Interior Dec. 483 (1958)	14
2 *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the State* (1957)	21
P. Kurland et al., *The Founders' Constitution* (1987)	22
14 Op. Att'y Gen. 426 (1874)	21
S. Rep. No. 268, 41st Cong., 3d Sess. (1870)	9
S. Rep. No. 698, 45th Cong., 3d Sess. (1879)	20
J. Story, *Commentaries on the Constitution* (1833)	22
H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953)	22
R. Strickland et al., *Felix Cohen's Handbook of Federal Indian Law* (1982)	14

In the Supreme Court of the United States

No. 02-281

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY, PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY, DAN LUCAS, INDIVIDUALLY AND AS SHERIFF, PETITIONERS

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

INTEREST OF THE UNITED STATES

The United States has a strong interest in effective law enforcement in Indian country, over which the National Government, the States, and the Tribes occupy overlapping spheres of authority, as well as in the surrounding community. The United States, in accordance with its "policy of supporting tribal self-government and self-determination," *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 & n.20 (1985), also has an interest in assuring that state law-enforcement authorities, when investigating crimes over which they have jurisdiction, do not unnecessarily intrude into a Tribe's sovereign ability to govern its members and its territory.

STATEMENT

1. The Bishop-Shoshone Indians of the Bishop Community (Tribe) is a federally recognized Tribe located on the

Bishop Paiute Reservation in California.[1] The Bishop Paiute Gaming Corporation (Corporation) is a corporation chartered and wholly owned by the Tribe. The Corporation operates and manages the Paiute Palace Casino (Casino) under a tribal-state compact approved by the Secretary of the Interior under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Pet. App. 12a.

In February 2000, the Inyo County District Attorney's Office asked the Casino for the employment records of three of its employees in connection with an investigation into whether they had committed welfare fraud by receiving public assistance in excess of the amount to which they were entitled in light of their employment by the Casino. The Tribe responded that, in accordance with its privacy policy, the records would not be released without the employees' consent. Pet. App. 12a.

In March 2000, the District Attorney obtained a search warrant from the Inyo County Superior Court authorizing a search of the Casino for payroll records of the three employees. On March 23, 2000, the Inyo County Sheriff and the District Attorney executed the warrant. At the time of the search, tribal officials asserted that the state court did not have jurisdiction to issue a warrant authorizing a search of premises and seizure of records belonging to a sovereign Tribe. The Sheriff and the District Attorney used deadbolt cutters to clip the locks off of the storage facility that contained the Casino's personnel records. They seized timecard entries, payroll registers, and payroll check registers relating to the three employees, as well as information contained in the Quarterly Wage and Withholding Reports that the Corporation had submitted to the State. Pet. App. 12a-14a, 45a.[2]

---

[1] The Bishop Paiute Tribe possesses all "immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 67 Fed. Reg. 46,328 (2002).

[2] Respondents do not appear to dispute that the warrant was supported by probable cause.

In July 2000, the District Attorney's Office informed the Tribe that it wished to obtain personnel records for six additional employees. In response, the Tribe reiterated its privacy policy, but offered to accept as evidence of consent a redacted copy of the last page of each employee's signed welfare application. The District Attorney refused the offer. Pet. App. 14a.

2. a. In August 2000, before any additional searches were conducted, the Tribe and the Corporation filed suit in federal district court against the District Attorney and the Sheriff, in their individual and official capacities, and against the County, seeking injunctive and declaratory relief. The complaint also sought damages under 42 U.S.C. 1983 for alleged violations of the plaintiffs' civil rights secured by the Fourth and Fourteenth Amendments and of the Tribe's right to self-government. Pet. App. 14a, 44a-45a; Compl. ¶¶ 33-39.

b. The district court dismissed all claims against all defendants. Pet. App. 44a-66a. The court held that the Tribe's sovereignty did not preclude the search and seizure of the Casino's personnel records. The court noted that "the Supreme Court has refused to apply a per se rule that would exclude state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at 60a-61a. The court, after weighing the competing interests of the State and the Tribe, concluded that, "[i]n the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant[s] against the tribe and tribal property." *Id.* at 62a. The court also held that the District Attorney and the Sheriff were entitled to qualified immunity from suit in their individual capacities. *Id.* at 57a-58a.

c. The court of appeals reversed. Pet. App. 1a-43a. The court held that "execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 20a (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). The court relied, in part, on circuit precedent that it characterized as

holding that "a subpoena issued against a tribe * * * cannot be enforced because of tribal immunity." *Id.* at 21a (citing *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993)). The court held that the district court had erred by balancing the interests of the Tribe and the State to determine whether the warrant was enforceable, stating that "the Supreme Court has adopted a more categorical approach denying state jurisdiction * * * over a tribe absent a waiver by the tribe or a clear grant of authority by Congress." *Id.* at 22a.

In the alternative, the court of appeals held that, "even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe." Pet. App. 23a. With respect to the Tribe's interests, the court observed that the Tribe's privacy policies "promote tribal interests, such as accuracy in tribal records, confidentiality of members' personal information and a trusting relationship with tribal members," and "affect the Casino, the Tribe's predominant source of economic development revenue." *Ibid.* The court acknowledged the State's countervailing "interest in investigating potential welfare fraud," but suggested that the State could do so "through far less intrusive means." *Id.* at 23a-24a.

In addition, the court of appeals held that the District Attorney and the Sheriff were not entitled to qualified immunity. Pet. App. 2a-7a. The court concluded that "a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction." *Id.* at 7a.[3]

---

[3] The court of appeals noted that, although circuit precedent precluded the Tribe from bringing a claim under 42 U.S.C. 1983 for a violation of its "right to tribal self-government," the Tribe's claim that the defendants violated the Fourth Amendment by executing a search warrant "in excess of [their] jurisdiction" was actionable under Section 1983. Pet. App. 6a n.4.

SUMMARY OF ARGUMENT

I. The Tribe is not a "person" who may sue and be sued under 42 U.S.C. 1983. This Court has held that the term "person" in Section 1983 does not encompass sovereigns such as States and foreign Nations. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 69-70 (1989). The same interpretive presumption applies to Indian Tribes, which are recognized as sovereigns under our constitutional structure and shared national history. The Corporation, as an "arm" of the Tribe, also is not a "person" within the meaning of Section 1983. The Corporation was established by the Tribe to conduct gaming under IGRA. Consistent with IGRA's requirements, the Tribe has sole proprietary interest in and responsibility for the Corporation's activities, controls its Board of Directors, budget, and policies, and must approve any waiver by the Corporation of its own sovereign immunity. Tribal law also provides that the Corporation's net revenues shall be devoted exclusively to the purposes authorized by the Tribe.

II. As a general matter, a State has jurisdiction to investigate and prosecute crimes committed on a reservation by and against non-Indians, as well as crimes committed off the reservation by tribal members. State law-enforcement officers, when investigating and prosecuting crimes within their criminal jurisdiction, generally may enter tribal land to execute state process. However, the State's authority to issue process against individuals and individual property on tribal land does not extend to the issuance of process directed at the Tribe itself or the Corporation, or the seizure of their property. Absent a waiver or congressional authorization, the Tribe is immune from suit in any court, including state court. It follows that a state court cannot obtain jurisdiction over the property of the Tribe through attachment or seizure.

That conclusion is supported by reference to the parallel context of federal enclaves. A state court may issue a writ of attachment against personal property located on a federal

enclave but belonging to a private individual. But the same is not true for property of the United States and its instrumentalities, which are immune from the jurisdiction of state courts. Similarly, the conclusion that property of the Tribe and its instrumentalities is not subject to state process is supported by established principles of Indian law. The execution of a search warrant directed at internal tribal documents may threaten the political integrity of the Tribe by undermining the tribal government's decision that such documents should remain confidential, disrupting the operations of the tribal facility at which the search occurs, and exposing internal tribal deliberations and investigations.

III. Even if the Tribe and the Corporation could state a valid Section 1983 claim, the individual petitioners would be entitled to qualified immunity. There is no "clearly established" law prohibiting state law-enforcement officers, when investigating a crime over which they have jurisdiction, from executing an otherwise valid search warrant directed at tribal documents on tribal property.

ARGUMENT

I. THE TRIBE, AS A SOVEREIGN, AND THE CORPORATION, AS AN ARM OF THAT SOVEREIGN, ARE NOT "PERSONS" WHO MAY SUE AND BE SUED UNDER 42 U.S.C. 1983

The Tribe and the Corporation cannot state an actionable claim under 42 U.S.C. 1983, regardless of whether the search and seizure of the tribal employment records were unlawful. That is because neither the Tribe nor the Corporation is a "person" who may sue and be sued under Section 1983.

Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983. It thus permits only a "citizen" or "other person within the [United States'] jurisdiction" to be a plaintiff in a Section 1983 suit, and permits only a "person" to be a defendant.

This Court has held that the term "person" in Section 1983 does not encompass sovereigns such as States, see *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 69-70 (1989), and foreign Nations, see *Breard* v. *Greene*, 523 U.S. 371, 378 (1998) (per curiam). Cf. *Ngiraingas* v. *Sanchez*, 495 U.S. 182 (1990) (a Territory is not a "person" under Section 1983). The Court has also held that the term "person" in Section 1983 excludes "arms" of a sovereign. See *Will*, 491 U.S. at 70 (citation omitted). By parity of reasoning, the Tribe, and the Corporation as an arm of the Tribe, are likewise not "persons" under Section 1983.

A. A Tribe, Like A State, Is Not A "Person" Within The Contemplation Of Section 1983

1. In *Will*, the Court held that "a State is not a 'person' within the meaning of § 1983." 491 U.S. at 65. The Court began its analysis with "the often-expressed understanding that in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Id.* at 64 (internal quotation marks omitted). The Court found that nothing in the statutory text, purpose, or history provided a reason to depart from that understanding. *Id.* at 64-70. To the contrary, the Court explained that construing the term "person" to exclude the States was particularly appropriate when, as in Section 1983, a contrary construction would "subject[] the States to liability to which they had not been subject before," without any clear indication that Congress so intended. *Id.* at 64; cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) (applying, in con-

text of *qui tam* suit under False Claims Act, "our longstanding interpretive presumption that 'person' does not include the sovereign," which "may be disregarded only upon some affirmative showing of statutory intent to the contrary").

Will concerned whether a State or a state agency is a "person" that could be a defendant in a Section 1983 suit. Although the Court has not addressed whether a State is a "person" that could be a plaintiff in a Section 1983 suit, Congress is presumed to have intended that a term have the same meaning throughout the statute in which it appears. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (noting that the presumption is "most vigorous when a term is repeated within a given sentence"). The Court has since held, citing *Will*, that a foreign nation "is not authorized to bring suit under § 1983," because it "is not a 'person' as that term is used in § 1983." *Breard*, 523 U.S. at 378; cf. *Stevens*, 529 U.S. at 787 n.18 (reserving question whether States may be "persons" entitled to bring *qui tam* suits under False Claims Act).

2. Indian Tribes, like States (and unlike, for example, municipal governments, see *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978)), are also sovereigns under the constitutional structure, albeit sovereigns of a distinct and dependent character. See pp. 15-16, *infra*. The Constitution expressly refers to the "Indian Tribes," Art. I, § 8, Cl. 3, and the sovereignty of the Tribes has been recognized throughout the Nation's history. See, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Article VI of the Constitution, "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties"); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-757 (1866). Accordingly, the "interpretative presumption that 'person' does not include the sovereign," *Stevens*, 529 U.S. at 780, properly applies to Tribes as well as to States in this context.

Nothing in the text, purpose, or history of Section 1983 operates against that presumption. To the contrary, the

context in which Section 1983 was enacted confirms that Congress did not understand the statutory reference to "person[s]" within the United States' jurisdiction to encompass Indian Tribes.

In 1870, shortly after the ratification of the Fourteenth Amendment, the Senate Judiciary Committee, at the direction of the full Senate, considered whether the Amendment applied to Tribes and tribal members. S. Rep. No. 268, 41st Cong., 3d Sess. (1870). In particular, the Committee was concerned with the question whether tribal members were covered by the Amendment's conferral of citizenship on "[a]ll persons born or naturalized in the United States, *and subject to the jurisdiction thereof*"—a question that the Committee understood could be answered "only * * * by determining the status of the Indian tribes at the time the amendment was adopted." *Id.* at 1. The Committee examined the status of the Tribes since the time of the European discovery and concluded that the Tribes retained aspects of their sovereignty, including "the right to regulate, without question, their domestic affairs, and make and administer their own laws, provided in the exercise of such right they should not endanger the safety of the governments established by civilized man." *Id.* at 2. In addition, the Committee noted that the Fourteenth Amendment's provision for congressional apportionment "counting the whole number of persons in each State, excluding Indians not taxed," indicated that the Amendment was intended to confer citizenship on former slaves (who had previously been counted as three-fifths of a person), but not on Indians. *Id.* at 10. Thus, the Committee concluded, without "hesitat[ion]," that "the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, '*subject to the jurisdiction*' of the United States; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment." *Id.* at 10-11; see *Elk* v. *Wilkins*, 112 U.S. 94

(1884) (holding that the Fourteenth Amendment did not grant citizenship to tribal members).

Four months after the report was published, Congress, acting pursuant to its authority to enforce the Fourteenth Amendment, enacted the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, which contained the precursor to Section 1983. See *Will*, 491 U.S. at 66; see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (noting that the Civil Rights Act of 1871 was enacted "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment'") (quoting *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 545 (1972)). In its original form, the provision authorized suit by "any person within the jurisdiction of the United States." 17 Stat. 13. Congress's use of that terminology in Fourteenth Amendment legislation, against the backdrop of the Senate Judiciary Committee's recent determination that Tribes and tribal members were not "persons subject to the jurisdiction" of the United States under the Fourteenth Amendment, indicates that Congress did not consider Tribes to be persons who could sue (or be sued) under Section 1983.[4]

In the intervening years, individual Indians have been granted full United States citizenship by Congress, without regard to their continuing tribal affiliation. See Act of June 2, 1924, ch. 233, 43 Stat. 253. They, like other "citizens," may now sue under Section 1983. At the same time, however, Congress and the Executive have continued to treat the Tribes themselves as sovereigns, and sovereigns are not, as

[4] In the 1874 revision and recodification, Congress altered the language governing who may sue under Section 1983 to "citizen[s] * * * or other person[s] within the jurisdiction" of the United States. Rev. Stat. § 1979. It is not clear why Congress made that revision. Congress made other revisions in 1874 that are similarly unexplained. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980) (addition of phrase "and laws"); *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.11 (1973) (addition of phrase "or Territory").

Will and *Breard* recognize, among the "persons" who may sue and be sued under Section 1983.[5]

B. A Tribal Casino Corporation, As An Arm Of The Tribe, Is Likewise Not A "Person" Under Section 1983

As the Court held in *Will*, the term "person" in Section 1983 excludes not only a State itself, but also those "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 491 U.S. at 70 (citation omitted). Analogously, because the term "person" excludes a Tribe, it also excludes arms of the Tribe, including a tribal gaming corporation organized under IGRA. In this case, the Corporation has been established by the Tribe to conduct Class III gaming under IGRA, pursuant to a compact between the Tribe and the State of California. See 25 U.S.C. 2710(d).

Whether an entity is an "arm" of the sovereign requires an analysis of such factors as "the nature of the entity created by [the sovereign's] law," *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 & n.5 (1997); the extent to which the entity functions autonomously from the sovereign, see *Moor* v. *County of Alameda*, 411 U.S. 693, 717-721 (1973); and whether the sovereign would be liable for a money judgment against the entity, see *Edelman* v. *Jordan*, 415 U.S. 651, 663-664 (1974). An entity that engages in commercial activities

[5] Two courts of appeals have held, although with little analysis, that Tribes may sue under Section 1983. See *Native Vill. of Venetie IRA Councils* v. *Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *Shakopee Mdewakanton Sioux Cmty.* v. *City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); but see *American Vantage Cos.* v. *Table Mountain Rancheria*, 292 F.3d 1091, 1097 (9th Cir. 2002) (questioning that position in dictum). The Seventh Circuit has stated in dictum that a State cannot sue under Section 1983, see *Illinois* v. *City of Chicago*, 137 F.3d 474, 477 (1998), while the Third Circuit has held that a State may do so in a *parens patriae* capacity, see *Pennsylvania* v. *Porter*, 659 F.2d 306 (1981) (en banc), cert. denied, 458 U.S. 1121 (1982). The claims in this case are not of a *parens patriae* character because the Tribe is seeking to vindicate its own interests as a sovereign, rather than the interests of individual tribal members. See *Alfred L. Snapp & Sons, Inc.* v. *Puerto Rico*, 458 U.S. 592 (1982).

may be an arm of the sovereign for these purposes as well. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Because tribal gaming corporations, such as the Corporation here, may exist only pursuant to the conditions set forth in IGRA, it is appropriate to consider IGRA, as well as tribal law, in analyzing whether the Corporation is an arm of the Tribe. See, *e.g.*, *Gavle* v. *Little Six, Inc.*, 555 N.W.2d 284, 292-296 (Minn. 1996) (relying on congressional intent expressed in IGRA in finding tribal casino to be immune from suit), cert. denied, 524 U.S. 911 (1998); *Trudgeon* v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65 (Ct. App. 1999) (same); cf. *Oklahoma Tax Comm'n* v. *Citizens Band of Potawatomi Indians*, 498 U.S. 505, 510 (1991).

First, with respect to the nature of the Corporation under tribal law, IGRA requires that Tribes, in their own gaming ordinances, provide that the "tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. 2710(b)(2)(A).[6] The Tribe's Ordinance so provides. Gaming Ordinance of the Bishop Paiute Tribe (Ordinance) § 103. The Gaming Compact between the Tribe and the State similarly represents that "[t]he Tribe is currently operating a tribal gaming casino offering Class III gaming activities on its land," authorizes "the Tribe * * * to engage" in the specified Class III gaming, and requires that "[t]he Gaming Operations authorized under this Gaming Compact shall be owned solely by the Tribe." Tribal-State Compact Between the State of California and the Bishop Paiute Tribe (Compact) Preamble C, §§ 3.0, 6.2 (Resps. C.A. R.E. 146, 149, 155). Indeed, in the complaint in this case, respondents identify the Corporation as "a political subdivision of the Tribe" that "share[s]" the Tribe's sovereign immunity. Compl. ¶¶ 2, 8 (Resps. C.A. R.E. 6, 8).

[6] IGRA carves out a narrow exception to this rule for individually owned operations if certain conditions are met. 25 U.S.C. 2710(b)(4). That exception is inapplicable here.

Second with respect to the Tribe's control over the Corporation, IGRA, as noted, requires the Tribe itself to exercise "sole * * * responsibility" for reservation gaming. 25 U.S.C. 2710(b)(2)(A). IGRA also requires the Tribe to assure that the Corporation's gaming revenues are used only for certain specified tribal purposes, such as "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," and "to promote tribal economic development." 25 U.S.C. 2710(b)(2)(B). In this case, under the Corporation's Charter, the Tribal Council appoints, and may remove, the members of the Corporation's Board of Directors. Charter § 4. The Tribal Council must approve the Corporation's annual budget, *id.* § 10, the Corporation's "policies, procedures, rules, and/or by-laws," *id.* § 13, and any waiver by the Corporation of its own sovereign immunity, *id.* § 2A. The Charter requires the Corporation to transfer all funds in excess of its operating budget and reserves to the Tribal Council on a quarterly basis. *Id.* § 11. Furthermore, the Tribe's Ordinance provides that "[t]he net revenues from any games shall be exclusively devoted to the purposes authorized by the BISHOP INDIAN TRIBAL COUNCIL" and shall not be used for purposes other than those specified in IGRA. Ordinance §§ 601, 602.

Third, with respect to the Tribe's liability for a money judgment against the Corporation, because all of the Corporation's net revenues are required under IGRA, the Ordinance, and the Charter to be transferred to the Tribe, any money judgment against the Corporation would necessarily deplete what would otherwise be tribal funds. No doubt for this reason, the Tribal Council, as noted above, must approve any waiver by the Corporation of its immunity from suit.[7]

[7] Corporations organized by Indian Tribes have been recognized to possess sovereign immunity in other circumstances, unless waived by the Tribe or corporation. In the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C.

Under the Gaming Compact, moreover, the Tribe itself is required to maintain liability insurance specifically for casino patron claims. See Addendum A to Compact 3 (Resps. C.A. R.E. 186).

In sum, the Corporation is properly viewed as an arm of the Tribe for purposes of sovereign immunity analysis. And, for that reason, the Corporation, like the Tribe, is not a "person" that can sue and be sued under Section 1983.

II. STATE OFFICERS MAY ARREST INDIVIDUALS OR SEARCH FOR AND SEIZE PRIVATE PROPERTY ON TRIBAL LANDS PURSUANT TO A STATE COURT WARRANT, BUT MAY NOT SEIZE PROPERTY OF THE TRIBE ITSELF OR THE TRIBE'S INSTRUMENTALITIES

For the reasons stated in Point I, neither the Tribe nor the Corporation has a cause of action against petitioners under 42 U.S.C. 1983. The Tribe and the Corporation have asserted other causes of action seeking prospective relief against petitioners, and seek declaratory and injunctive relief under 28 U.S.C. 1331 to vindicate the Tribe's rights under federal law and to establish that state law is preempted to the extent that it purports to authorize the seizure of tribal records. See, *e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-475 (1976); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 665-666 (1974); cf. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850-853 (1985). For that reason, the United States addresses the merits of the Tribe's submission that state officers do not have authority to execute a search warrant to seize records of the Corporation. For the reasons explained below, although state officers, pursuant to a warrant, may arrest an individual Indian or non-Indian on tribal property for the commission of an off-reservation crime, and may search for and seize personal property of an individual as evidence of such a crime even where that property is situated on land owned by or held in trust for the Tribe within the reservation, they may not seize the property of the Tribe (or the Corporation) itself. That proposition follows from (i) the decisions on which this Court relied in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), (ii) the Court's understanding of the term "process" in *Hicks*, (iii) background principles concerning the execution and service of process by state officers on federal enclaves, on which this Court relied in *Hicks*, and (iv) established principles that prohibit States from exercising jurisdiction over an Indian Tribe itself, as distinguished from the exercise of jurisdiction over individual tribal members or non-Indians within the Tribe's reservation.

476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The principal reason for the enactment of Section 17 was a concern that non-Indian entities might be reluctant to enter into commercial dealings with a tribal government because of its immunities, and the separately chartered corporation therefore could provide for a waiver of immunity in appropriate circumstances and under whatever conditions the Tribe and corporation found to be appropriate. See 65 Interior Dec. 483, 484 (1958); R. Strickland et al., *Felix Cohen's Handbook of Federal Indian Law* 325-327 (1982). Charters of incorporation issued under Section 17 of the IRA often contain clauses expressly allowing the corporation to sue or be sued, and such clauses have been construed to waive the immunity of the separate entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Whether such an IRA Section 17 corporation is subject to suit would depend, however, on whether the Tribe or the corporation itself had waived the sovereign immunity that would otherwise attach to the entity.

A. Although Tribes Retain Inherent Sovereignty, States Have Authority Within Indian Country To Investigate Crimes That Are Within Their Prosecutorial Jurisdiction

Indian Tribes, as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (15 Pet.) 17 (1831), retain a significant measure of the inherent sovereignty that they possessed before European discovery and settlement. See *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978) ("[T]ribes still possess those aspects of sovereignty not withdrawn by

treaty or statute, or by implication as a necessary result of their dependent status."). Among the core attributes of inherent sovereignty that Tribes retain, and that are protected by federal law, are those rights, powers, and immunities that are necessary to their survival as self-governing political communities. See, *e.g.*, *Duro* v. *Reina*, 495 U.S. 676, 685-686 (1990) (Tribes retain the "necessary powers of internal self-governance," including those "needed to control their own internal relations," "to preserve their own unique customs and social order," and "to prescribe and enforce internal criminal laws.") (citations omitted).[8]

As this Court has explained, "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361. Thus, as a general matter, a State has jurisdiction to investigate and prosecute crimes committed on a reservation that exclusively involve non-Indians, see *United States* v. *McBratney*, 104 U.S. 621 (1881), although it does not have jurisdiction over crimes involving Indian perpetrators or Indian victims on a reservation. Such crimes are instead within the jurisdiction of the United States, see 18 U.S.C. 1152, 1153, and the Tribe. See *Duro*, 495 U.S. at 680-681 n.1 (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country).

In those States (including California) where Public Law 280 applies, the State has jurisdiction over crimes "committed by or against Indians," as well as crimes involving only non-Indians. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588. See 18 U.S.C. 1162(a). The United States retains the authority, however, to enforce those federal criminal laws, such as those governing mail or wire fraud, firearms, and narcotics, that are generally applicable throughout the

[8] The Tribes thus retain the authority to prosecute Indians for crimes committed on the reservation. See *Wheeler*, 435 U.S. at 326. The penalties that a Tribe may impose, however, are limited to one year's imprisonment, a $5000 fine, or both. 25 U.S.C. 1302(7).

Nation, as well as certain other laws that are specifically applicable in Indian country, see 18 U.S.C. 1154 *et seq.*, such as those intended to protect the financial integrity of the Tribe itself, see, *e.g.*, 18 U.S.C. 1163. Although Public Law 280 also addresses state civil jurisdiction over Indian country, 28 U.S.C. 1360, its civil provisions have been construed narrowly to authorize only the extension of state *adjudicatory* jurisdiction over disputes involving Indians and arising in Indian country. See *Bryan* v. *Itasca County*, 426 U.S. 373, 387-388 (1976). Public Law 280 does not authorize any additional civil regulatory jurisdiction by the State, nor does it waive the Tribes' sovereign immunity from suit. See *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 892 (1986); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In addition, IGRA gives the United States, the State, and the Tribe a role in the regulation of reservation gaming operations. IGRA provides that Class III gaming activities, such as those conducted by the Tribe's Corporation in this case, are lawful on Indian lands only if those activities are (1) "authorized by [a tribal] ordinance" approved by the National Indian Gaming Commission (NIGC), (2) "located in a State that permits such gaming," and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" and approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(l)(A)-(D) and (3). Such tribal-state compacts may provide for the State to exercise "criminal jurisdiction with respect to gambling on the lands of the Indian tribe." 18 U.S.C. 1166(d). In the absence of such a provision in the governing compact, the United States exercises exclusive jurisdiction over violations of state gambling laws on the reservation. *Ibid.*

Finally, as this Court recently reaffirmed in *Hicks*, 533 U.S. at 365-366, a State has authority to prosecute tribal members for violations of its criminal laws *off* the reservation. See *United States* v. *Antelope*, 430 U.S. 641, 647 n.7 (1977); *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392,

397 n.11 (1968). The parties in this case appear to agree that the alleged welfare fraud that petitioners were investigating in this case is properly categorized as an off-reservation crime. In pursuing welfare fraud, a State (or a Tribe) not only enforces its own laws, but also carries out the mandates of the United States.[9] The question here is the scope of the State's authority on the reservation in connection with the investigation and prosecution of such a crime that occurs off the reservation.

B. State Law-Enforcement Officers, When Investigating And Prosecuting Crimes Within Their Jurisdiction, Generally May Enter A Reservation To Execute State Process, But May Not Do So Against The Tribe Itself

1. In *Hicks*, the Court held that a Tribe did not have the authority to regulate state law-enforcement officers who were executing a search warrant in the course of investigating a crime allegedly committed by an individual tribal member outside the Tribe's reservation. That conduct by state

[9] The Temporary Assistance for Needy Families (TANF) program (formerly the Aid to Families with Dependent Children (AFDC) program), which is administered by all States (and some Tribes) under Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.*, is primarily funded through federal block grants. Federal law requires a State to certify as part of its State Plan that it has established and is enforcing standards and procedures to ensure against fraud and abuse. See 42 U.S.C. 602(a)(6), 609(a)(1). A State may be penalized if it does not participate in the Income and Eligibility Verification System, the system used by Inyo County in this case to detect potential instances of unreported income. See 42 U.S.C. 609(a)(4), 1320b-7. Those provisions demonstrate the significant federal interest in state (and tribal) efforts to prosecute welfare fraud.

In addition, the United States seeks to ensure that the jurisdictions with TANF programs cooperate with one another to prevent duplication of benefits. Federal regulations specifically require a Tribe that wishes to implement its own TANF program to include in the Tribal Plan assurances that a family may not receive duplicative assistance, and the Plan "must include a description of the means by which the Tribe will ensure duplication does not occur." 45 C.F.R. 286.75(f). The Department of Health and Human Services has informed this Office that the Owens Valley Consortium, a tribal consortium that includes the Tribe here, operates its own TANF program for tribal members.

officers in *Hicks* took place on the allotted land of the tribal member within the reservation. 533 U.S. at 371. The Court quoted the statement in *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28, 31 (1885), that "[i]t has . . . been held that process of [state] courts may run into an Indian reservation of this kind"—*i.e.*, one that has not been excluded from the territory of a State, see 533 U.S. at 363 n.5—"where the subject matter or controversy is otherwise within their cognizance." *Id.* at 363. The Court also relied on a similar reference in *United States* v. *Kagama*, 118 U.S. 375 (1886), in which it upheld the constitutionality of the Major Crimes Act (which provides federal jurisdiction over enumerated crimes between Indians in Indian country) as an exercise of Congress's power to effectuate its undertaking to protect the Indian Tribes, often specifically as against the States, because the Tribes had become dependent on the United States through a long course of dealing. See *id.* at 383-385. In doing so, the Court in *Kagama* stressed that the law "does not interfere with the process of the State courts within the reservation." *Hicks*, 533 U.S. at 363 (quoting 118 U.S. at 383). These statements in *Utah & Northern* and *Kagama*, the Court noted in *Hicks*, "suggest state authority to issue search warrants in cases such as this"—that is, cases involving search warrants directed at the property of an individual Indian in connection with the investigation of a crime that he allegedly committed outside the reservation. The Court did not suggest that either *Utah & Northern* or *Kagama* would support the issuance of state process running against the Tribe itself or calling for the seizure of property belonging to the Tribe.

Indeed, in *Utah & Northern*, the Court stated, in the sentence preceding the one quoted above referring to the process of state courts, that "[t]he authority of the territory may rightfully extend to all matters not interfering with [the] protection" afforded by the Treaty with the Shoshone Indians. 116 U.S. at 31. One important purpose of any treaty or statute setting aside a reservation for an Indian Tribe is to

afford it a territory within which the Tribe itself can be autonomous and protected from state interference. *Kagama*, 118 U.S. at 384; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879)); see also *McClanahan* v. *Ariziona State Tax Comm'n*, 411 U.S. 164, 171-175 (1973); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985).

2. Furthermore, the Court in *Hicks* noted that the word "process," which was used in both *Utah & Northern* and *Kagama*, is defined as "'any means used by a court to acquire or exercise its jurisdiction over a person or over specific property,' *Black's Law Dictionary* 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085." 533 U.S. at 364. That understanding of "process" does not support the issuance of a warrant or other state-court process running against the Tribe itself or calling for the seizure of property owned by the Tribe. It has long been recognized that an Indian Tribe is immune from suit in any court, including state court, unless Congress has authorized such a suit or the Tribe has waived its immunity. See *C & L Enters.* v. *Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001); *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998); *Three Affiliated Tribes*, *supra*; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). That immunity extends to attachment of the property of a Tribe as well. See *Lineen* v. *Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Maryland Casualty Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1961). Accordingly, a general rule that state process may be served or executed on an Indian reservation does not mean that a state court may obtain jurisdiction over the Tribe itself, either in a civil suit naming the Tribe as a defendant or in a criminal prosecution of the Tribe, for "it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172 (1977). Nor, for the same reasons, may a state court obtain jurisdiction, through attachment or seizure, over the property of a Tribe within a reservation. Such property, like the Tribe itself, is immune from attachment or other judicial process, such as a search warrant, issued by a state court.[10]

3. This conclusion is supported by the Court's reliance in *Hicks* on the parallel context of federal enclaves, in which, the Court noted, "the reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" 533 U.S. at 364 (quoting *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 533 (1885)). Accordingly, under provisions allowing service of state process on federal enclaves, civil process may be served on an individual in a suit arising out of conduct that occurred outside the federal enclave, *Ohio River Contract Co.* v. *Gordon*, 244 U.S. 68 (1917); a state court may issue a warrant for the arrest of an individual charged with a crime outside the enclave, 2 *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the States* 121 (1957) (*Report*),[11] and personal property situated on the federal enclave but belonging to a private party may be subject to a writ of attachment issued by a state court, see 14 Op. Att'y Gen. 426 (1874). Morever, the rationale of

---

[10] The United States, as a sovereign superior to the States (under the Supremacy Clause) and to the Tribes (under the constitutional structure), may issue and execute process directed at state and tribal property, although the United States ordinarily does not find it necessary to resort to such process. The Tribes' sovereignty, while subordinate to the sovereignty of the United States, is not subordinate to that of the States. Of course, given the United States' superior sovereignty with respect to the Tribes, the court of appeals was mistaken in suggesting that tribal sovereignty would "den[y] the federal government the authority to compel disclosure of tribal documents." Pet. App. 21a (citing *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993)).

[11] The 1957 *Report* explained (at 121-122), however, that "various Federal instrumentalities have regulations governing the manner in which state process may be served, and even in the absence of formal regulations on the subject, the service of process may not be accomplished in a manner so as to constitute an interference with an instrumentality of the Federal Government."

Hicks presumably would permit the issuance of a warrant calling for the seizure within the enclave of contraband or other personal property of an individual suspected of having committed a crime outside the enclave.

These various forms of state process are consistent with and effectuate the exercise of state authority over private persons in connection with their conduct outside the enclave. See J. Story, *Commentaries on the Constitution* 3 § 1220 (1833) ("[G]enerally there has been a reservation of the right to serve all state process, civil and criminal, upon *persons* found therein.") (emphasis added) (quoted in P. Kurland et al., *The Founders' Constitution* 237 (1987)). They therefore support the exercise of parallel authority by a State on an Indian reservation in connection with conduct occurring outside the reservation and over which the State has jurisdiction.[12]

Nothing in the authority to serve process on *private persons*, however, would subject the United States to suit in state court. Nor would it subject the property of the United States within the enclave to attachment by a state court or to seizure pursuant to a warrant issued by a state court, because "[a] proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota* v. *United States*, 305 U.S. 382, 386 (1939); accord *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). The immunities of the United States itself and its instrumentalities from the jurisdiction of the state courts thus remain intact within a federal enclave. Indeed, it follows a fortiori from the very purpose for which such enclaves are established—to ensure

[12] Similarly, state law-enforcement officers, when investigating on-reservation crimes that are within their jurisdiction under Public Law 280 (or another source of authority), may execute state process directed at Indians and Indian property on the reservation. As the Court has noted, Public Law 280 was intended to correct "a hiatus in law-enforcement authority" that had occurred in Indian country, because the United States did not have authority to prosecute all crimes involving Indians, the States did not have authority to prosecute any such crimes, and the Tribes did not have resources to prosecute them. *Bryan* v. *Itasca County*, 426 U.S. at 379-380 (quoting H.R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953)).

freedom from interference by the States—that the property belonging to and used by the federal government within the enclave is not subject to attachment or seizure by a state court. And that purpose would apply with particular force to documents, analogous to those at issue here, that the United States treated as confidential. Accordingly, nothing in this Court's recognition in *Utah & Northern*, *Kagama*, and *Hicks* that state process may similarly extend into an Indian reservation, including for the seizure of Indian and non-Indian individuals and property found therein, suggests that such state process may run against the Tribe itself or against its property. Because the State retains its authority to issue process running against individuals and their personal property within Indian reservations, respect for the core immunities of the Tribe from state process does not undermine the goal, recognized in *Hicks*, to "prevent [such areas] from becoming an asylum for fugitives from justice." 533 U.S. at 364 (quoting *Fort Leavenworth R.R.*, 114 U.S. at 533).

4. *Hicks* arose out of the execution of a search warrant on reservation land held in trust for an individual Indian. But the Court's use of such general terms as "tribal land," 533 U.S. at 355, and "tribe-owned land," *id.* at 371, suggests that the Court did not contemplate any categorical distinction, with respect to the execution of state process, between land owned by or held for the benefit of the Tribe as an entity, and land allotted in trust or fee to an individual tribal member. See *id.* at 387 (O'Connor, J., concurring in part and concurring in judgment) (referring to "land owned and controlled by the tribe").

Nor would such a distinction comport with the assignment to the States of the responsibility to prosecute—and therefore to investigate—significant categories of crime. On some reservations, all of the land may be held in trust for the Tribe itself, including the parcels on which individual tribal members reside. On any reservation, moreover, a crime that the State has jurisdiction to prosecute (*e.g.*, because it involves non-Indians or because Public Law 280 applies) could

occur at a tribal enterprise, or at a tribal housing complex, that is located on tribal land within the reservation. And, even when a crime occurred off the reservation (and thus within the State's jurisdiction regardless of the parties involved), evidence of the crime might be found on tribal property. For example, a tribal member suspected of being involved in an off-reservation crime (such as that at issue in *Hicks*) might reside on tribal rather than allotted land, or contraband or other evidence of the crime might be secreted on tribal land. State officers' ability to investigate and prosecute those crimes that are within their jurisdiction would be severely compromised if they were categorically prohibited from entering and executing state process on all property that is owned by or held in trust for the Tribe itself.[13]

Although state process therefore can run against private persons and their personal property even when they are on tribal premises, the property of the Tribe itself (or of its instrumentalities) remains immune from state process under the rationale of *Hicks*.

5. The conclusion that property of the Tribe itself (or of its instrumentalities) may not be attached or seized pursuant to a warrant or other process issued by a state court also is supported by established principles of Indian law. In *Hicks*, the Court explained that the execution of a state search warrant at a tribal member's residence on the reservation did

[13] A subpoena *duces tecum*, which may be used in some instances instead of a search warrant to obtain documents or other evidence in the hands of a third party, directs that party or its agent to produce the evidence in a judicial or administrative proceeding. A subpoena is generally viewed as a less intrusive means than a warrant for obtaining evidence from a third party (see, *e.g.*, 28 C.F.R. 59.1(b)). Nevertheless, a subpoena directed to a Tribe or tribal officials to obtain property (records) belonging to the Tribe does implicate tribal sovereign immunity. A federal agency or official, for example, is immune from a subpoena for federal records issued by a state court. See *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Edwards* v. *United States Dep't of Justice*, 43 F.3d 312 (7th Cir. 1994); *Boron Oil Co.* v. *Downie*, 873 F.2d 67 (4th Cir. 1989); see also *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

not "directly" implicate tribal "*[s]elf*-government and *internal* relations." 533 U.S. at 371. The Court reasoned that the Tribe's interest in supervising the conduct of state law-enforcement officers executing the warrant—officers who were not members of the Tribe, and who did not derive their authority from the Tribe—was outweighed by "the State's interest in pursuing off-reservation violations of its laws." *Id.* at 370.

The Tribe's interests are qualitatively different when a warrant is directed at the property of the Tribe itself, particularly its own internal documents. Such a warrant would threaten "the political integrity * * * of the tribe," *Hicks*, 533 U.S. at 371 (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)), in a way that a warrant directed at private individuals or their personal property does not. It would override the tribal government's policy choice concerning the confidentiality of its own records, including private information obtained by the Tribe from its members. It could disrupt the operations of the particular tribal facility at which the search occurred. And it could, in some cases, expose internal tribal deliberations and investigations.

Various Acts of Congress that affirm tribal sovereignty and self-government support the conclusion that state courts may not assert jurisdiction over tribal property.[14] Similarly, decisions of this Court suggest that there is an important distinction between the assertion of state jurisdiction over

[14] See, *e.g.*, 25 U.S.C. 1301(1) (defining "Indian tribe" as "any tribe * * * recognized as possessing powers of self-government"); 25 U.S.C. 4101(7) (finding that federal housing assistance should be provided in a manner that "recognizes the right of Indian self-determination and tribal self-governance"); 25 U.S.C. 3601 (finding that Congress has recognized the self-determination and inherent sovereignty of Tribes); 25 U.S.C. 479a note (finding that the United States "has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes"); Exec. Order No. 13,175, 65 Fed Reg. 67,249 (2000) (stating that the "Nation, under the law of the United States * * * has recognized the right of Indian tribes to self- government").

individual Indians who are within the territory of the Tribe on the reservation and assertions of state authority that would interfere with the operations of the Tribe itself. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 126 (1993) (indicating that State could tax income of tribal members who work within Tribe's territory but live outside Indian country, but reserving question whether "the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country"); accord *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 464 (1995).

In many cases, the interest in the integrity of tribal documents extends beyond that of the Tribe itself. Increasingly, Tribes are carrying out governmental functions previously performed by the federal government, pursuant to contracts with the Bureau of Indian Affairs or the Indian Health Service. The United States retains a strong interest in the performance of those functions. Moreover, the United States frequently engages in joint undertakings with tribal governments, including joint criminal investigations involving tribal law-enforcement officers and the Federal Bureau of Investigation, the Bureau of Indian Affairs, the Drug Enforcement Administration, the Border Patrol, and other federal law-enforcement agencies. In districts where many of the cases prosecuted by the United States Attorney's Office arise in Indian country, tribal law-enforcement officers may initiate and investigate the case. Documents and other materials generated in such joint undertakings, like other federal government materials, would be immune from state process in their own right.

6. The recognition of tribal immunity from state process does not prevent state officers from obtaining information in other ways. They can seek state warrants or subpoenas directed to the individuals involved. They can also try to arrive at cooperative solutions with the Tribe. Cf. *Texas* v. *New Mexico*, 462 U.S. 554, 575 (1983) ("Time and again we have counseled States engaged in litigation with one another before this Court that their dispute is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."). In this case, for example, federal regulations would have permitted state officials to share information the Tribe sought concerning the TANF applicants who were the subject of the state investigation, if the Tribe had suitable confidentiality standards, as it apparently did. See 45 C.F.R. 205.50(a)(2)(ii). In the context of Class III gaming operations governed by IGRA, the State can seek information-sharing arrangements as part of the tribal-state compact.

In many instances, moreover, federal agencies having law-enforcement responsibilities on the reservation can be of assistance in a state investigation. With respect to gaming operations, for example, the NIGC "may demand access to and inspect, examine, photocopy, and audit all papers, books and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out [its] duties" under IGRA. 25 U.S.C. 2706(b)(4); see 25 C.F.R. 571.5-571.7. Such "other matters" include Class III gaming. In addition, the NIGC has authority to close or fine any gaming operation for violation of IGRA, its implementing regulations, or the tribal gaming ordinance. 25 U.S.C. 2713. In aid of that authority, the NIGC may require by subpoena the testimony of witnesses and the production of any documents relating to any matter under consideration or investigation. 25 U.S.C. 2715(a); see 25 C.F.R. 571.8-571.10. Consequently, the NIGC's authority extends to all gaming records, including payroll and similar tribal gaming employee records. When the NIGC obtains information indicating a violation of the law, the NIGC turns over the records to the appropriate law enforcement authorities, including state authorities. 25 U.S.C. 2716(b).

III. EVEN IF RESPONDENTS HAD A RIGHT OF ACTION UNDER 42 U.S.C. 1983, THE INDIVIDUAL PETITIONERS WOULD BE ENTITLED TO QUALIFIED IMMUNITY

Even if the Tribe and the Corporation could otherwise state a valid Section 1983 claim, the individual petitioners would be entitled to qualified immunity. Qualified immunity shields government officials from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In order for a plaintiff to overcome the defense of qualified immunity, "[t]he contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987); see *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Even if the Court finds a constitutional violation here that may be vindicated under 42 U.S.C. 1983, that right cannot be said to be clearly established. Cf. *Wilson* v. *Layne*, 526 U.S. 603 (1999) (concluding that searches involving media ride-along violated the Fourth Amendment, but that officers were entitled to qualified immunity).

At the time of the events at issue, as today, there was no "clearly established" law prohibiting state law-enforcement officers, when investigating a crime over which they have jurisdiction, from executing an otherwise valid search warrant directed at tribal documents on tribal property. The court of appeals held that the officers' conduct violated the Fourth Amendment, see Pet. App. 42a, but it is by no means clear that a sovereign Indian Tribe is among "the people" protected by the Fourth Amendment. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-277 (1990); cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (a State is not a

"person" for purposes of the Due Process Clause). Furthermore, the United States is unaware of any appellate authority prior to the decision under review holding conduct such as that at issue here unlawful, under either the Fourth Amendment or under principles of tribal sovereignty.[15] The court of appeals, in concluding that respondents' right to be free from such a search was "clearly established," relied on cases in which state officers were held to have executed illegal searches on a reservation. See Pet. App. 5a-6a. In those cases, however, the state officers were pursuing crimes over which the State did not have jurisdiction. See *United States* v. *Baker*, 894 F.2d 1144, 1146 (10th Cir. 1990); *Sycuan Band of Mission Indians* v. *Roache*, 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994). Those decisions did not clearly establish a Tribe's immunity from seizures of tribal documents relevant to crimes over which the State *has* authority.

The court of appeals also relied (Pet. App. 4a) on its earlier decision in *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993). That case, however, did not involve a question of *state* search and seizure authority. In *James*, the court of appeals upheld the federal district court's quashing of a subpoena *duces tecum* directed to a tribal government official during a federal rape prosecution. The defendant in that case had requested confidential information concerning the victim's mental health, and the court of appeals ruled that the Tribe had immunity from that subpoena. *James* involved a subpoena for records sought by an individual defendant, and did *not* hold that the Tribe would be immune from document requests by government law-enforcement agencies. *James* therefore did not clearly establish a tribal immunity to resist searches and seizures by state officials for property held by the Tribe itself. Furthermore, the reasoning in *James* was seriously flawed.

---

[15] The court of appeals held, following circuit precedent, that the right to tribal self-government is not an interest that gives rise to a suit under 42 U.S.C. 1983. See Pet. App. 42a.

An official of an Indian Tribe, a sovereign that is subordinate to and dependent upon the United States, has no authority to disregard a subpoena issued by a court of the superior sovereign. See note 10, *supra*. A Ninth Circuit decision that is, in fact, flawed on the issue it addressed can hardly be said to establish clearly the law in this Court on a distinct question.[16]

In sum, in view of the state of the law at the time, reasonable state law-enforcement officers, who were investigating off-reservation state crimes within their jurisdiction and who were acting pursuant to a facially valid warrant, would not have understood that they could not search for and seize employment records from a tribal casino on an Indian reservation. Accordingly, the individual petitioners would be entitled to qualified immunity, even if, contrary to the United States' submission, this action can be brought under 42 U.S.C. 1983.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that respondents have a right of action under 42 U.S.C. 1983 and that the individual petitioners are not entitled to qualified immunity from a suit for money damages. The judgment of the court of appeals should be affirmed insofar as it holds that state officers do not have authority to seize property of the Tribe or the Corporation pursuant to a warrant issued by a state court.

Respectfully submitted.

---

[16] Indeed, even if *James* were not flawed, it would not render the right clearly established for purposes of this Court's review. Cf. *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (vacating Ninth Circuit decision finding clearly established right to not be subjected to media ride-along in light of *Wilson* v. *Layne*, *supra*).

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
BARBARA MCDOWELL
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
R. JUSTIN SMITH
ETHAN G. SHENKMAN
Attorneys

JANUARY 2003